

opposing party about the request and shall inform the Board whether the opposing party consents to the request or will file an opposition.

(e) *Jurisdictional questions.* The Board may at any time consider the issue of its jurisdiction to decide a case.

(f) *Procedure.* Unless otherwise directed by the Board, a party may respond to a written motion other than a motion pursuant to 6101.26, 6101.27, 6101.28, or 6101.29 (Rules 26, 27, 28, or 29) at any time within 20 calendar days after the filing of the motion. Responses to motions pursuant to 6101.26, 6101.27, 6101.28, or 6101.29 (Rules 26, 27, 28, or 29) may be made only as permitted or directed by the Board. The Board may permit hearing or oral argument on written motions and may require additional submissions from any of the parties.

(g) *Motions for summary relief.* (1) A motion for summary relief should be filed only when a party believes that, based upon uncontested material facts, it is entitled to relief in whole or in part as a matter of law. A motion for summary relief should be filed as soon as feasible, to allow the Board to rule on the motion in advance of a scheduled hearing date.

(2) With each motion for summary relief, there shall be served and filed a separate document titled Statement of Uncontested Facts, which shall contain in separately numbered paragraphs all of the material facts upon which the moving party bases its motion and as to which it contends there is no genuine issue. This statement shall include references to the supporting affidavits or declarations and documents, if any, and to the 6101.4 (Rule 4) appeal file exhibits relied upon to support such statement.

(3) An opposing party shall file with its opposition (or cross-motion) a separate document titled Statement of Genuine Issues. This document shall identify, by reference to specific paragraph numbers in the moving party's Statement of Uncontested Facts, those facts as to which the opposing party claims there is a genuine issue necessary to be litigated. An opposing party shall state the precise nature of its disagreement and give its version of the facts. This statement shall include

references to the supporting affidavits or declarations and documents, if any, and to the 6101.4 (Rule 4) appeal file exhibits that demonstrate the existence of a genuine dispute. An opposing party may also file a Statement of Uncontested Facts as to any relevant matters not covered by the moving party's statement.

(4) When a motion for summary relief is made and supported as provided in 6101.8 (Rule 8), an opposing party may not rest upon the mere allegations or denials of its pleadings. The opposing party's response, by affidavits or as otherwise provided by 6101.8 (Rule 8), must set forth specific facts showing that there is a genuine issue of material fact. If the opposing party does not so respond, summary relief, if appropriate, shall be entered against that party. For good cause shown, if an opposing party cannot present facts essential to justify its opposition, the Board may defer ruling on the motion to permit affidavits to be obtained or depositions to be taken or other discovery to be conducted, or may make such other order as is just.

(h) *Effect of pending motion.* Except as the rules of this chapter provide or the Board may order, a pending motion shall not excuse the parties from proceeding with the case in accordance with the rules of this chapter and the orders and directions of the Board.

[72 FR 36795, July 5, 2007, as amended at 73 FR 26950, May 12, 2008]

6101.9 Record of Board proceedings; review and copying [Rule 9].

(a) *Composition of the record for decision.* The record upon which any decision of the Board will be rendered consists of:

(1) The notice of appeal, petition, or application;

(2) Appeal file exhibits other than those as to which an objection has been sustained;

(3) Hearing exhibits other than those as to which an objection has been sustained;

(4) Pleadings;

(5) Motions and responses thereto;

(6) Memoranda, orders, rulings, and directions to the parties issued by the Board;

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(7) Documents and other tangible things admitted in evidence by the Board;

(8) Written transcripts or electronic recordings of proceedings;

(9) Stipulations and admissions by the parties;

(10) Depositions, or parts thereof, received in evidence;

(11) Written interrogatories and responses received in evidence;

(12) Briefs and memoranda of law; and

(13) Anything else that the Board may designate. All other papers and documents are part of the administrative record of the proceedings and are not included in the record upon which the Board's decision will be rendered.

(b) *Enlargement of the record.* The Board may at any time require or permit enlargement of the record with additional evidence and briefs. It may reopen the record to receive additional evidence and oral argument at a hearing.

(c) *Protected and in camera submissions.* (1) A party may by motion request that the Board receive and hold materials under conditions that would limit access to them on the ground that such documents are privileged or confidential, or sensitive in some other way. The moving party must state the grounds for such limited access. The Board may also determine on its own initiative to hold materials under such conditions. The manner in which such materials will be held, the persons who shall have access to them, and the conditions (if any) under which such access will be allowed will be specified in an order of the Board. If the materials are held under such an order, they will be part of the record of the case. If the Board denies the motion, the materials may be returned to the party that submitted them. If the moving party asks, however, that the materials be placed in the administrative record, *in camera*, for the purpose of possible later review of the Board's denial, the Board will comply with the request.

(2) A party may also ask, or the Board may direct, that testimony be received under protective order or *in camera*. The procedures under paragraph (c)(1) of this section shall be fol-

lowed with respect to such request or direction.

(d) *Review and copying.* Except for any part thereof that is subject to a protective order or deemed an *in camera* submission, the record in a Board proceeding shall be made available for review at the Office of the Clerk of the Board during the Board's normal working hours, as soon as practicable given the demands on the Board of processing the subject case and other cases. If a request is made for copies of documents, and if making such copies involves more than minimal costs to the Board, reimbursement will be required. If a request is made for a copy of a transcript which was prepared pursuant to a contract with the Board, the fee charged by the Board for a copy of the transcript will be at the rate established by the contract. When required, the Office of the Clerk will certify copies of papers and documents as a true record of the Board. Except as provided in 6101.17 and 6101.32 (Rules 17 and 32), the Office of the Clerk will not release any part of the record in its possession to anyone.

6101.10 Admissibility of evidence [Rule 10].

In general, any relevant and material evidence will be admitted into the record. The Board may exclude evidence to avoid unfair prejudice, confusion of the issues, undue delay, waste of time, or needless presentation of cumulative evidence. Hearsay evidence is admissible unless the Board finds it unreliable or untrustworthy. As a general matter, and subject to the other provisions of 6101.10 [Rule 10], the Board will look to the Federal Rules of Evidence for guidance when it makes evidentiary rulings.

[73 FR 26950, May 12, 2008]

6101.11 Conferences; conference memorandum [Rule 11].

(a) *Conferences.* The Board may convene the parties in conference, either by telephone or in person, for any purpose. The conference may be stenographically or electronically recorded, at the discretion of the Board. Matters to be considered and actions to be taken at a conference may include: